IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KATIA GUTIERREZ DE MARTINEZ, *ET AL.*,

Petitioners,

—v.—

DIRK A. LAMAGNO, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT DIRK A. LAMAGNO

ANDREW J. MALONEY, III
Counsel of Record
KREINDLER & KREINDLER
Attorneys for Respondent
Dirk A. Lamagno
100 Park Avenue
New York, New York 10017
(212) 687-8181

On the brief:
Andrew J. Maloney, III

QUESTION PRESENTED

1. Does the Attorney General's certification that a Government employee was acting within the scope of employment, under the Westfall Act, 28 U.S.C. 2679(d)(1), require that the United States be substituted for the employee as the defendant in a civil action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

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WAIVER OF CERTAIN STATEMENTS

Respondent, pursuant to Rule 24.2 of this Court, waives its right to present a statement listing the parties, opinions and judgments delivered in the Courts below, as well as statements of jurisdiction and statutes which are required and contained in Petitioners' and the Government's briefs pursuant to Rules 24.1(b), (d), (e) and (f).

STATEMENT OF THE CASE

A. Factual Background

Petitioners Katia Gutierrez de Martinez, Eduardo Martinez Puccini and Henry Martinez de Papaiani, citizens of the Republic of Colombia, brought a common law negligence action in the Eastern District of Virginia, against Respondent, Special Agent ("S.A.") Dirk Lamagno of the Drug Enforcement Administration ("DEA"), the DEA, and the United States of America, alleging injuries from an automobile collision with S.A. Lamagno that occurred in Barranquilla, Colombia on the evening of January 18, 1991.[1] It was specifically alleged that S.A. Lamagno negligently caused the automobile collision by speeding and driving while intoxicated. Petitioners further alleged that the accident occurred at night after business hours and that S.A Lamagno was accompanied by an unidentified female who Petitioners also claim "was not a federal employee" and that they were "driving away from his hotel." (Petitioners' Brief at 7).

Neither the Government nor S.A. Lamagno have ever admitted any of Petitioners' allegations and although the Government never filed responsive pleadings, it denied many of the allegations in its motion to dismiss the Complaint and in opposition to Petitioners' motion to amend the Complaint. The Government offered proof that all DEA personnel working in Colombia are authorized to use DEA vehicles for virtually all travel because of inherent dangers associated with the nature of their work in assisting the Colombian Government in its battle against violent drug cartels. The vehicles

[1] The claims against the DEA and the United States were for the allegedly negligent training of its agents at DEA Headquarters in order to escape the statutory bar of 28 U.S.C. § 2680(k) for torts committed in a foreign country. Petitioners also alleged racial discrimination for the United States' failure to act on their pending administrative claims based on their Latin race denying them due process and equal protection of the laws. These claims were dismissed and all that remains before the Court is the case against S.A. Lamagno.

provided were armor plated with bullet-proof glass.[2] The Government further stated that S.A. Lamagno was returning to his hotel while in Barranquilla, because he was sent there by the DEA from Bogota for temporary duty. (Government's Memorandum in Support of Motion to Dismiss filed March 23, 1993 at 2-3; Government's Reply to Plaintiffs' Opposition to Dismissal, filed April 12, 1993 at 3-4).[3]

Contrary to the suggestion in Petitioners' brief, the police report does not indicate that S.A. LaMagno was speeding or was driving while intoxicated at the time of the accident. The only assertion that S.A. Lamagno was intoxicated is in Petitioners' Complaint, which is based on the assertions of Plaintiff Katia Gutierrez de Martinez, who "detected that [S.A. Lamagno] was under the influence of alcohol." (Petitioners' Complaint ¶ 9). The Complaint however, also alleged that the same Katia Gutierrez de Martinez was rendered unconscious and trapped in the motor vehicle for 45 minutes. (Petitioners' Complaint, ¶¶ 5, 16; Administrative Claim, p. 2, filed May 8, 1991; Petitioners' brief to the Fourth Circuit at 3 and 5).

B. Proceedings Below

On March 3, 1993, the United States Attorney for the Eastern District of Virginia, Richard Cullen, certified that he had investigated the circumstances of the incident and found that S.A. Lamagno was acting in the scope of his employment for the United States of America at the time of the incident.[4] (JA

[2] Agents and Government employees do not typically obtain their own automobile insurance, leaving them financially exposed for accidents that can occur at any time they are in their vehicles.

[3] Although not specifically argued below, S.A. Lamagno was assigned to the Bogota, Columbia office and was returning from a DEA meeting in Barranquilla accompanied by Julie Bermann, an intelligence analyst for DEA assigned to Columbia for temporary duty. Both DEA personnel attempted to render aid to Petitioners after the collision. After the accident, S.A. Lamagno remained working in Columbia continuously for approximately three years.

[4] The United States Attorneys have been authorized to issue certifications on behalf of the Attorney General. 28 U.S.C. C.F.R. § 15.3(1) (1989).

1-2).[5] The Government then moved to substitute itself for S.A. Lamagno as the defendant pursuant to 28 U.S.C. § 2679(d)(1), commonly known as the "Westfall Act." (JA 3-6). The District Court granted the Government's motion on March 5, 1993 and dismissed the Complaint against S.A. Lamagno. (JA 7-8).

Subsequently, the Government filed a motion to dismiss the Complaint against the DEA and the United States under the foreign country exception to the Federal Tort Claims Act ("FTCA"), pursuant to 28 U.S.C. § 2680(k), which bars suits against the United States for torts committed in a foreign country. The motion to dismiss was argued on April 16, 1993 and the District Court granted the Government's motion on April 20, 1993. (JA 9).

Petitioners appealed on several grounds, including that the Attorney General's certification under § 2679(d)(1) was reviewable and should be overturned. The United States Attorney's Office for the Eastern District of Virginia defended the District Court judgment and argued that the certification was conclusive and not reviewable in the Fourth Circuit. The Department of Justice, which once advocated that position, has inexplicably changed its position and now believes that the certifications are reviewable.

The Fourth Circuit affirmed the dismissal, holding in its relevant part, that the Attorney General's certification under § 2679(d)(1) was conclusive and not reviewable, citing its *en banc* decision in *Johnson v. Carter*, 983 F.2d 1316 (4th Cir.), *cert. denied*, 114 S. Ct. 57 (1993). (JA 10-20).

SUMMARY OF THE ARGUMENT

Under the Westfall Act, a certification by the Attorney General or her designate that a federal employee was acting within the scope of the employee's office or employment is conclusive and not subject to review. The central purpose of

[5] JA refers to the Joint Appendix filed by Petitioners.

the Westfall Act is to protect federal employees from litigation and judicial intervention by allowing the United States to be substituted as the defendant in place of the employee. Both the plain and unambiguous language of the statute and the purpose underlying the Act, make it clear that the certification by the Attorney General is all that is required to protect federal employees from being sued in their personal capacities.

Congress expressly granted the Attorney General and her designates the power and discretion to examine claims against federal employees to determine their employment status under § 2679(d)(1). The statute mandates that "[u]pon certification by the Attorney General . . . the United States *shall* be substituted as the party defendant." (emphasis supplied). This language is mandatory and does not leave room for a court to review the Attorney General's certification. While Petitioners refer to other subsections of the Act in an attempt to strain the plain language of § 2679(d)(1), those subsections grant different rights addressing different circumstances but do not create an ambiguity in the plain meaning of subsection (d)(1).

While this Court should end its inquiry here, a review of the Westfall Act's legislative history confirms Congress' intent to grant to the Attorney General unfettered discretion to make scope of employment determinations involving the Government's work force, thereby assuring federal employees immunity where appropriate.

Congress clearly and justifiably intended to provide for conclusive certification by the Attorney General, particularly in cases involving federal law enforcement personnel and their confidential operations, both here and abroad. Open inquiry into these matters could endanger the United States and the lives of its employees and agents.

Providing the Attorney General with ability to protect federal employees from personal liability for negligent acts committed in the course and scope of their employment is not a violation of the separation of powers doctrine and does not deny a plaintiff due process and equal protection. Rather, it is the Federal Tort Claims Act ("FTCA") exemptions under 28

U.S.C. § 2680 that leave Petitioners without a jurisdictional foothold and a remedy.

The fact that the Federal Tort Claims Act bars suit against the United States for torts that occurred in a foreign country, does not make for a constitutional infirmity in the certification provisions of the statute.

This Court should accordingly affirm the judgment of the Court of Appeals in the Fourth Circuit and rule that the Attorney General's certification under § 2679(d)(1) is not reviewable.

ARGUMENT

THE ATTORNEY GENERAL'S CERTIFICATION UNDER THE WESTFALL ACT ESTABLISHES THAT THE GOVERNMENT EMPLOYEE WAS ACTING IN THE SCOPE OF HIS EMPLOYMENT AND DICTATES AUTOMATIC SUBSTITUTION OF THE UNITED STATES FOR THE EMPLOYEE AS THE DEFENDANT IN ANY TORT ACTION

This case presents a question under the Westfall Act that has divided the federal courts of appeals. The Fourth Circuit has held in this case and in its *en banc* decision in *Johnson v. Carter*, 983 F.2d 1316 (4th Cir.), *cert. denied*, 114 S.Ct. 57 (1993), that the Attorney General's certification under 28 U.S.C. 2679(d) that a federal employee was acting within the scope of employment requires a court to substitute the United States as the defendant in place of the named federal employee. The Fifth and Tenth circuits have ruled similarly.[6] Eight other circuits have adopted various degrees of the opposite position.[7] Those circuits hold that the Attorney General's

[6] *See Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Mitchell v. Carlson*, 896 F.2d 128, 136 (5th Cir. 1990).

[7] Immediately after enactment of the Westfall Act, the United States took the position in litigation that the Attorney General's scope-of-employment certifications were conclusive and unreviewable; since 1990 it has argued to the contrary. *See e.g., Arbour v. Jenkins*, 713 F.Supp. 229, 230 (E.D. Mich. 1989), *reversed* 903 F.2d 416 (6th Cir. 1990); *S.J. & W. Ranch, Inc. v. Lehtinen*, 717 F.Supp. 824 (S.D. Fla. 1989) *reversed* 913 F.2d 1538 (1990); *Petrousky v. United States*, 728 F.Supp. 890, 891 (N.D.N.Y. 1990).

certification is not conclusive on the question of substitution, under § 2679(d)(1), nor on the question of removal, under § 2679(d)(2) and is subject to challenge by plaintiffs in tort litigation.[8]

A. The Plain And Unambiguous Language Of The Westfall Act Requires Substitution After Certification And Does Not Empower A Court To Review The Certification.

When the terms of a statute are plain and unambiguous, judicial inquiry is complete, except in rare circumstances, and this Court should assume that the legislative purpose is expressed by the ordinary meaning of the words used. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169-73 (1993) (court in referring to dictionary definitions held "conduct" and "participate" meant taking part in directing or controlling a Rico enterprise even under the liberal construction rule that Congress intended); *see also*, *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *United States v. James*, 478 U.S. 597, 606 (1986); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Subsection (d)(1) of the Westfall Act uses plain and unambiguous language. The word "shall" is plain and clearly

[8] *See McHugh v. University of Vermont*, 966 F.2d 67, 73-75 (2d Cir. 1992); *Schrob v. Catterson*, 967 F.2d 929, 935 (3d Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 744-745 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir.), *cert. denied*, 112 S.Ct. 200 (1991); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (1990), *modified*, 924 F.2d 1555 (11th Cir.), *cert. denied*, 502 U.S. 813 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 812-814 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

mandatory. It is a word of command.[9] In ordinary usage it means "must" and is inconsistent with the concept of discretion. *Johnson*, 983 F.2d at 1319-21 (the meaning of "shall" is plain and unambiguous giving no discretion to the district court in requiring substitution); *Aviles*, 887 F.2d at 1048-49 (mandatory language of § 2679(d) does not permit challenge to Attorney General's certification); *Mitchell*, 896 F.2d at 130-31 (district courts do not have power to review certification; substitution is required).[10]

This Court has further addressed an almost identical issue involving the Westfall Act and the Gonzalez Act, 10 U.S.C. § 1089, in *United States v. Smith*, 499 U.S. 160 (1991). The Government substituted itself for a military doctor accused of committing malpractice while stationed in Italy. The Ninth Circuit had held that neither the Gonzalez Act nor the Westfall Act required substitution of the Government or otherwise immunized the doctor, because the FTCA did not provide a remedy due to the foreign tort exception under § 2680(k). In reversing the Ninth Circuit, this Court held that "§ 6 [of the Westfall Act] directs the Attorney General in appropriate tort cases to certify that a Government employee named as defendant was acting within the scope of his employment when he committed the alleged tort." *Smith* at 166. This Court further held that "Congress recognized that the *required* substitution of the United States as the defendant in tort suits filed against

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[9] *See also* Black's Law Dictionary's definition of "shall" at 1375 (Sixth Edition 1990); Webster's Collegiate Dictionary, at 1075 (Tenth Edition 1993).

[10] *See e.g.*, criminal cases directing courts to act using the word "shall;" *Smith v. United States*, 113 S.Ct. 2050, 2057-60 (1993) (18 U.S.C. § 924(c) requires a mandatory minimum sentence of five years; no discretion); *Chapman v. United States*, 500 U.S. 453, 463-64 (1991) (21 U.S.C. § 841 narcotics statute required courts to include the weight of the carrier medium for LSD to determine a mandatory minimum sentence; no discretion); *United States v. Posner*, 868 F.2d 720, 724 (5th Cir. 1989) (F.R.Crim.P. 32(a)(1)(c) "the Court *shall* address the defendant" at a sentencing to determine if defendant wishes to make a statement and failure to do so is error) (emphasis supplied).

Government employees would sometimes foreclose a tort plaintiff's recovery altogether." *Id.* (emphasis supplied). This Court reversed the Ninth Circuit which had held the substitution was not required. Finding no ambiguities in the Westfall Act, despite a challenge by respondent-plaintiff to other perceived ambiguities in the statute, the *Smith* Court ruled that the Act's language was plain and clear and that the scope of the employment issue was, pursuant to the statute, for the Attorney General to decide. *Id.* at 160, 173.

Petitioners and several courts of appeals have asserted that when subsection (d)(1) of the Westfall Act is compared to (d)(2) of the Act, which governs removal of cases, an ambiguity is created in subsection (d)(1). Petitioners assert that because subsection (d)(2) specifies that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," the mere absence of such language in the text of subsection (d)(1), compels an opposite conclusion.

This argument ignores the fact that subsection (d)(1) is clear even without the clause found in subsection (d)(2). Petitioners' assertions of ambiguity do not transform this clear statute into an ambiguous provision. *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978); *see also James*, 478 U.S. at 604-05 (1986).

A more valuable comparison is that between subsection (d)(2) and the old § 2679(d) (1982), known as the Federal Drivers Act, which in its pertinent part read:

> Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

Subsection (d)(2) of the new § 2679, the Westfall Act, has specifically repealed the language above by not only deleting it but by specifically adding that the Attorney General's

certification makes the removal to federal court conclusive. The Courts once had the ability to review the Attorney General's certification and order a remand of the case to state court; now they do not. *Egan by Egan v. United States*, 732 F. Supp. 1248, 1251-52 (E.D.N.Y. 1990) *but see*, *McHugh*, 966 F.2d 67; *See also Mitchell*, 896 F.2d at 130.

Some courts, supporting Petitioner's arguments, contend that they can review the scope of the employment question after the Attorney General's certification, find that the certification is invalid, and remand the case to state court. *See*, *e.g.*, *McHugh*, 966 F.2d at 73 (citations omitted). A remand by the district court after the Attorney General has certified, however, is a clear violation of subsection (d)(2)'s mandatory language that the certification is conclusive. If the district court can review and remand, the language of "conclusive . . . for purposes of removal" would be inconsistent and meaningless. *Salomon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1990); *Jackson v. Neuger*, 783 F.Supp. 558, 559-60 (D. Colo. 1992); *Egan*, 732 F.Supp. at 1251-52.

Some courts have taken the inconsistent middle ground and have held that the removal after certification is unreviewable but the court can still review certification, find it invalid, but nevertheless retain subject matter jurisdiction for the case in federal court. *See e.g.*, *Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir.), *cert. denied* 113 S. Ct. 68 (1993). This position makes little sense, the logical intention, as reflected by the language in both (d)(1) and (d)(2), was to make the certification conclusive for *all* purposes. After removal upon certification, the Attorney General does not then have to certify again for substantive purposes under (d)(1), nor can the Attorney General then decide not to certify because once the initial certification has taken place, it becomes conclusive for both removal and substitution. *Salomon* at 1143; *Aviles* at 1049; *Jackson* at 559-60; *Egan* at 251-52.

The conclusive effect of subsection (d)(1) is further confirmed by the fact that the Westfall Act expressly articulates when a court *can* review the scope of the employment issue. Subsection (d)(3) expressly states that if the Attorney General refuses to certify:

> *the employee* may . . . petition the court to find and certify that the employee was acting in the scope of his office or employment . . . [and] [i]f . . . the district court determines that the employee was not acting within the scope . . . the action shall be remanded to the State court.

(emphasis supplied). Noticeably absent is any provision for a plaintiff to seek judicial reversal of a certification by the Attorney General. This omission is telling.

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Plaintiffs may not like this scheme, but this Court has itself noted that Congress gave "considerably less solicitude for tort plaintiffs' rights" in passing the Westfall Act. *Smith*, 499 U.S. at 175. It is not the province of the courts to question this policy determination.[11]

Finally, subsection (d)(4) of the Westfall Act further confirms the mandatory nature of substitution in each of the Act's subdivisions by stating "Upon certification . . . [under] paragraph (1), (2), or (3) [the action] *shall* proceed in the same manner as any action against the United States . . ." (emphasis supplied).

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[11] If the Attorney General's certification was not intended to be conclusive for all purposes, then Congress would not have mentioned the Attorney General or certification at all.

The language of the Westfall Act is repeatedly clear using the word "shall" no less than seventeen times, requiring district courts to comply with the mandatory and restrictive procedures for immunizing federal employees. The Westfall Act was intended to be read in conjunction with the sovereign immunity waiver that Congress has granted under the FTCA and its restrictive sister statutes. *See, e.g., Lehman v. Nakshian*, 453 U.S. 156, 160-161 (1981) (conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto under the FTCA and its accompanying statutes are not to be implied but must be unequivocally expressed).

B. The Legislative History Of The Act Supports The Conclusive Effect Of The Attorney General's Certification.

This Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), appeared to erode the immunity from liability of federal employees acting in the scope of their employment, by requiring that they be found to have engaged in the exercise of some discretionary function before receiving immunity from personal liability. Congress subsequently passed the Westfall Act to restore the broad immunity of federal employees, while enhancing the Attorney General's ability to swiftly immunize federal employees in appropriate cases. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988, Section 2 ("the Act").

Congress' intent in the Westfall Act was to minimize the burden on federal courts and employees. It feared that the Court's decision in *Westfall* would require a time consuming "fact-based determination" of whether the federal employee was exercising Governmental discretion. H.R. No. 700, 100th Cong., 2d Sess. 2 (1988), *reprinted* in 1988 U.S. Code Cong. Admin. News 5946 ("House Report"). The House Report further indicated that the bill would amend § 2679(d) to:

> *require* the United States to be substituted . . . *whenever* the Attorney General determines that the [relevant] act . . . was within the scope of the employee's office or employment. *Once made, this determination would also require* that any case filed in State Court be removed to a Federal district court.

House Report at 5952, section 6 (emphases supplied). The language above clearly indicates an intention to delegate solely to the Attorney General, the role of making scope of employment determinations, regardless of whether the certification is made under subsection (d)(1) for actions filed in federal court, or subsection (d)(2) for actions filed in a state court.

Similarly, members of the United States Senate were concerned that *Westfall* created "insecurity and uncertainty among Federal employees, [and] that it [would] place an enormous litigation burden on the Department." 1988 WL 177191, Proceedings and Debates of the 100th Congress, 2d Session, October 11, 1988 at 1. The new § 2679 addresses both concerns, by (1) making irrelevant any inquiry into the discretionary nature of the function performed by the employee; thereby providing security and certainty among federal employees; and (2) delegating the certification issue to the Attorney General. The benefit to the employee is not only immunity from personal liability, but also protection from lengthy and uncertain litigation. *See Mitchell* 896 F.2d at 133.

Petitioners and several circuits have, however, cited an April 13, 1988 Congressional Subcommittee Hearing at which Congressman Barney Frank surmised that a "plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were [sic] certifying without justification." Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committees on the Judiciary, 100th Cong., 2d Sess. 60, 128 (April 14, 1988). A similar statement was made during the hearings by Deputy Assistant Attorney General Robert Willmore. However, while the beliefs and understandings of Congressman Frank and

Deputy Assistant Attorney General Willmore are interesting, they do not amount to the legislative intent of Congress.

In addressing the House Report, Judge Nickerson in *Egan*, 732 F.Supp. at 1252 stated:

> The Report is cited not to show "legislative intent." i.e., what the members of Congress who adopted the Act had in mind. There is manifestly no such thing. No one knows, or can know, what the mental state of each of the legislators was, or what concerns, important or trivial or perhaps even irrelevant to the announced purpose of the legislation, motivated their votes. Moreover, it is fatuous to suppose that there is a composite group intention of the legislators.

(citations omitted).

The Fifth Circuit in *Mitchell*, 896 F.2d at 136 held that:

> Isolated language found scattered throughout the legislative history is insufficient persuasion that Congress intended to frustrate the very purpose of the Westfall Act, to protect its employees from the distraction and burden of litigation based upon their employment activities. If there is a policy defect in the statute, it is in a failure of Congress to have waived sovereign immunity broadly enough, not in a failure to protect employees in all of their course-of-employment activities.

While Petitioners and the Government cite isolated statements that were made in early deliberations over the bill that became the Westfall Act, no such statements were made several months later when the Act was passed, nor did accordant language make it into the statute itself. The most reliable indicators of Congressional intent are the Reports of the two Houses of Congress. Those reports confirm their intent to make the Attorney General's determination conclusive and nonreviewable.

C. The Westfall Act Is Constitutionally Sound And The Conclusive Effect Given To The Attorney General's Certification Does Not Violate The Due Process, Equal Protection Or Separation Of Powers Clauses.

Congress has the power to enact legislation that determines when courts have jurisdiction and when plaintiffs have a remedy against the United States. U.S. Const. Art. I, § 1; *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (statutory grant of jurisdiction is narrower than the constitutionally permissible jurisdictional allowance); *Smith*, 499 U.S. at 166 (plaintiffs may be left without a remedy under the FTCA by virtue of §§ 2680(k) and 2679). Congress recognized that the exceptions under the FTCA 28 U.S.C. § 2680 "would sometimes foreclose a tort plaintiff's recovery altogether." *Smith*, 499 U.S. at 166. Petitioners seek to circumvent the holding in *Smith* by arguing that unless the Attorney General's certification is reviewable under the Westfall Act, they will be deprived of due process because they will ultimately be foreclosed from a remedy under § 2680(k) for their foreign tort claim.

The Westfall Act, Subsection (d)(1) does not "deprive" Petitioners of their ability to bring an action, only their ability to bring it against S.A. Lamagno. Where there is no deprivation, no due process is required. It is § 2680's exceptions of the FTCA that deprive Petitioners of a remedy.[12]

It is undisputed that Congress has the power to foreclose a plaintiff from recovering in an action against the United States for negligence committed in a foreign country. *Smith*, 499 U.S. at 166. Therefore, whether certification under § 2679(d) is the initial vehicle in barring that recovery is irrel-

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[12] The Due Process clause is not implicated by the negligent acts of Government officials for unintended loss or injury because it does not "deprive" a person of life, liberty or property via an abusive Government power. *Daniels v. Williams*, 474 U.S. 327 (1986). In addition, Congress has provided for a procedure in which an injured party may recover damages in limited circumstances under the FTCA.

evant, Petitioners' due process attack is in reality, an attack on the foreign tort exception under the FTCA. It is only when the FTCA bars a recovery against the United States that plaintiffs have challenged the certification in an attempt to expand the potential for recovery beyond the FTCA.[13]

To demonstrate a deprivation of due process rights, Petitioners' must demonstrate that the Congressional mandate of § 2679(d) was wholly arbitrary and irrational in purpose and effect, *see Pension Benefit Guaranty Corp. v. R.A. Fray & Co.*, 467 U.S. 717, 728-34 (1984); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n.32 (1978) (otherwise settled expectations may be changed by legislative action). They have failed to do so.

In passing the Westfall Act, Congress weighed the interest of the United States and its employees, against the interests of prospective plaintiffs, and in favoring the former two, designed a stream-lined approach to resolving the scope of employment issue with little litigation and delay. Congress explicitly stated its intent to restrict a plaintiff's remedies in order to prevent the "substantial diminution in the vigor of federal law enforcement and implementation." House Report at 3, U.S. Code Cong. & Admin. News 1988, pp. 5945, 5947. In so doing, Congress has provided ample justification and a rational purpose for treating all plaintiffs' suits in the same manner when the action is against the United States or an employee acting on its behalf, and accordingly does not violate equal protection or substantive due process.

This Court in *Block v. Community Nutrition Institute*, 467 U.S. 340, 349-51 (1984), denied the consumers of dairy products the ability to obtain judicial review of milk market orders. The *Block* Court ruled that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be

[13] Petitioners still have a remedy under 21 U.S.C. § 904 from the DEA.

impliedly precluded." *Id.* at 349 (citation omitted). Likewise under the Westfall Act, Congress considered who should be entitled to judicial review and when they should receive it under subsection (d)(3); Congress concluded that the *employee not* the plaintiff can petition for review if the Attorney General refuses certification.

In *Morris v. Gressette*, 432 U.S. 491, 504-05 (1977), this Court held that the Attorney General's action under the Voting Rights Act of 1965 was an unreviewable determination. "Congress had intended the approval procedure to be expeditious and that reviewability would unnecessarily extend the period the State must wait for effecting its change." *Id.* at 504-05.

So too has Congress under the Westfall Act, precluded judicial review of the Attorney General's certification in response to the decision in *Westfall v. Erwin*. Any "presumption favoring judicial review [is] overcome, whenever the Congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351 (citation omitted).

Petitioners contend that the conclusive effect of the Attorney General's certification violates the separation of powers clause. However, Congress can delegate certain powers to both the Executive and Judicial Branches of Government. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 372 (1989) (establishing sentencing commission to enact sentencing guidelines was not an improper delegation of legislative authority or a violation of separation of powers); *Kahn v. Hart*, 943 F.2d 1261 (10th Cir. 1991) (President empowered to prescribe limits on punishment in military court martials); *Haige v. Agee*, 453 U.S. 280 (1981) (Secretary of State empowered to revoke passport from a United States citizen under certain circumstances that may effect national security or foreign policy); *INS v. Doherty*, 502 U.S. 314 (1992) (Attorney General has broad discretion in alien deportation proceedings).[14]

[14] *See also, Thomas v. Union Carbide Agriculture Prod. Co.*, 473 U.S. 568 (1985) (pesticide regulation and compensation pursuant to Act

Congress explicitly contemplated the effect of the Westfall Act in conjunction with the Federal Tort Claims Act, with the specific design and rational purpose of protecting federal employees and can delegate discretion to the Attorney General. The Westfall Act is a constitutionally sound sister statute to the FTCA.

D. Policy Rationale

The reliance of Petitioners and the Government on "assumptions" of traditional judicial review under various Rules of Civil Procedure is unavailing. Each of the Rules cited explicitly grants courts the power to review when new parties should become part of a case.

These general rules can never serve to defeat the specific language of the Westfall Act. Even if it could be said that their general terms conflict with the specific language in the Westfall Act, the latter must govern under established rules of statutory construction.

All "assumptions" in favor of judicial review that may exist in traditional litigation simply do not apply when the United States or its employees are sued. Congress has carefully enacted legislation that carves out specific procedures,

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vesting powers of review to arbitration board); *Wade v. United States*, 112 S.Ct. 1840, 1843 (1992) (prosecutor's discretion not to file a 5K1.1 motion to reduce a criminal defendant's sentence based on substantial assistance, is reviewable only in the rare showing of an unconstitutional motive on the part of the prosecutor); *United States v. Batchelder*, 442 U.S. 114 (1979) (prosecutorial discretion in choosing which of several applicable charges to prosecute and when); *Touby v. United States*, 500 U.S. 160 (1991) (Attorney General given discretion to temporarily set narcotics schedule defining criminal conduct was guided by an intelligible Congressional principle); *United States v. Bozarov*, 974 F.2d 1037 (9th Cir.), *cert. denied*, 113 S.Ct. 1273 (1993) (no judicial review of Secretary of Commerce's discretion to determine items on commodities control for export list under the Export Administration Act); *National Federation of Federal Employees v. United States*, 905 F.2d 400 (D.C. Cir. 1990) (Secretary of Defense and committee empowered to determine which military bases to close was not reviewable).

requirements and exemptions when plaintiffs sue a Government employee and/or the United States itself. *Lehman*, 453 U.S. at 160-61 (conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied but must be unequivocally expressed). Congress did not expressly or implicitly grant Courts the power to determine if a federal employee was acting in the scope of his or her employment under the Act, except in a situation where the Attorney General refuses to certify and the employee petitions the Court to review that refusal. To interpret the Westfall Act as permitting Petitioners to challenge the Attorney General's certification before a Court makes law out of what Congress has *not* said. *See e.g. In Re Szafranski*, 147 B.R. 976 (N.D. Okla 1992).

There is a sound policy rationale for the conclusive effect afforded to the Attorney General's certification by the Westfall Act. This action, where Petitioners seek a hearing that would force disclosures about the operations of the DEA Special Agents engaged in semi-covert operations in South America, is the perfect vehicle for examining that rationale. Disclosures in such a hearing could be devastating or even fatal, especially since it is not clear whether the issue would be decided by a judge or jury. *See e.g. Brown v. Armstrong*, 949 F.2d 1007, 1011 (8th Cir. 1991) (examining scope of employment issue raises questions as to whether a judge or jury decides the issue).

More practically, if judicial review is allowed, conflicts will arise as to what law governs scope of employment for this issue. Federal employees who operate under a common employment mandate should not be subject to the vagaries of the disparate laws that may apply to their cases. Congress anticipated these problems and in relieving the courts of burdensome litigation on these issues, empowered the Attorney General with conclusive discretion to make a determination about a federal employee's scope of employment.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

Andrew J. Maloney, III
Attorney for Respondent
DIRK A. LAMAGNO
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181